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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TAYLOR RYAN FROEBE, Appellant.	)	2 CA-CR 2011-0035 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094221001

Honorable Richard S. Fields, Judge

AFFIRMED

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Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, appellant Taylor Froebe was convicted of robbery and criminal damage. Finding he had four historical prior felony convictions, the trial court sentenced him to concurrent terms of imprisonment, the longer of which is eight years.

On appeal, Froebe argues the evidence was insufficient to sustain his robbery conviction "because the taking of the property was not contemporaneous with the threat or use of force."

¶2 In reviewing a claim of insufficient evidence, we review the evidence "'in the light most favorable to sustaining the conviction'" and resolve all reasonable inferences against the defendant. *State v. Haas*, 138 Ariz. 413, 419, 675 P.2d 673, 679 (1983), *quoting State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). We do not reweigh the evidence, but instead determine "whether there was sufficient evidence that a rational trier of fact could have found guilt beyond a reasonable doubt." *Id.*

¶3 In October 2009, Froebe entered a mall department store with the intent to steal merchandise. A plainclothes store security officer was watching when Froebe started putting video discs in his shopping cart. A different security employee then observed Froebe go into another department, where he filled two shopping bags with the discs and clothing.

¶4 When Froebe walked past the cash registers at the store's outdoor lawn and garden center without paying, he was stopped by a uniformed store security guard. Froebe then dropped the bags, "got combative," and began "fight[ing] [to] get away." The security officer who had first observed Froebe inside the store arrived to help subdue him, but he "was really fighting them to stay up." A customer attempted to help the security staff and, after the three men pinned Froebe to the ground, he began yelling, "get the f[---] off me, I have a knife." The men released him, and one of the security officers testified he had seen a knife in Froebe's possession. Both security officers testified that store policy requires them to disengage from a shoplifter who is armed.

¶5 Upon being released, Froebe "ran out the first two feet" of the exit and "came back to grab" one of the bags filled with video discs. He then ran to a vehicle in the parking lot. When a security officer for the mall attempted to stop Froebe from driving away, he drove into another vehicle, causing over $2,600 in damages.

¶6 On appeal, Froebe asserts the evidence was insufficient to support the robbery conviction because "the taking of the property occurred after—and independently of—the physical encounter" with security guards. He contends he did not intend to take property from the store by use or threat of force, but to shoplift, and that the altercation with security guards ensued only because they tried to detain him, and because he tried to escape. According to Froebe, his intent to take the discs after the men had released him "arose after the struggle occurred and was independent of the earlier events." He argues that his intent to take items was formed after he used force, and the evidence was therefore insufficient to support a robbery conviction, citing *State v. Anderson*, 210 Ariz. 327, 342-43, 111 P.3d 369, 384-85 (2005); *State v. Comer*, 165 Ariz. 413, 420, 799 P.2d 333, 340 (1990), *State v. Lopez*, 158 Ariz. 258, 264, 762 P.2d 545, 551 (1988), and *State v. Wallace*, 151 Ariz. 362, 365, 728 P.2d 232, 235 (1986).

¶7 We agree with the state that these cases do not support Froebe's claim of insufficient evidence. In *Lopez*, our supreme court found there was insufficient evidence to support a robbery conviction where the defendant had murdered the victim before stealing his property, and there was no evidence to "support[] a finding that [he] had an intent to commit a robbery while . . . using force" against the victim. *Lopez*, 158 Ariz. at 264, 762 P.2d at 551. Instead, the evidence suggested "the defendant and his brother took the car and the billfold for the purpose of removing themselves from the scene, to attempt to prevent or delay identification of the body, and to destroy evidence." *Id.*

Similarly, in *Wallace*, "a defendant's guilty plea to armed robbery was set aside because the defendant's use of force upon the victim was not intended to coerce surrender of her money and her truck, which were stolen after her murder." *Id.*, *citing Wallace*, 151 Ariz. at 366, 728 P.2d at 236.

¶8 But the court later distinguished these cases in *State v. Comer*, clarifying that "a robbery may . . . be established when the use of force precedes the actual taking of property, so long as the use of force is accompanied with the intent to take another's property." 165 Ariz. 413, 421, 799 P.2d 333, 341 (1990) (only reasonable inference from evidence "was that [the defendant] shot [the victim] in furtherance of his previously formulated plan to obtain money and supplies"); *see also State v. Anderson*, 210 Ariz. 327, ¶¶ 55-58, 111 P.3d 369, 384-85 (2005) (sufficient evidence supported jury's implicit finding that, before murdering victim, defendant planned to steal his truck and money).

¶9 Pursuant to A.R.S. § 13-1902(A),

> A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

Our supreme court has made clear that a robbery occurs when force is used "to either take the property or to resist the retaking of the property," but "is not committed when the thief has gained peaceable possession of the property and uses no violence except to resist arrest or effect his escape." *State v. Celaya*, 135 Ariz. 248, 252, 660 P.2d 849, 853 (1983).

¶10 The court distinguished between mere "custody" and "possession" or "control" of property, citing *State v. Rodriquez*, a case in which a defendant had obtained

"custody" of money he had been handed by a narcotics agent, for the purpose of counting it "as a preface to [a] drug transaction," and then "threatened the agent with a gun in order to keep the money in his possession." *Celaya*, 135 Ariz. at 252, 660 P.2d at 853, *citing Rodriquez*, 125 Ariz. 319, 320, 609 P.2d 589, 590 (App. 1980). The court in *Celaya* approved the decision affirming Rodriquez's conviction for robbery, stating, "Although the defendant had custody of the money, the narcotics agent did not relinquish possession or control of the money until he felt he was going to be shot. Since control (as contrasted with custody) of the money was obtained by force, a robbery occurred." *Celaya*, 135 Ariz. at 252, 660 P.2d at 853; *see also Bauer v. State*, 45 Ariz. 358, 363, 43 P.2d 203, 205 (1935) ("[E]ven though the snatching of a thing is not looked upon as a taking by force, it is otherwise where there is a struggle to keep it.").

¶11 Here, Froebe admitted he had gone into the department store to steal merchandise. He did not have "peaceable possession" of the products in the shopping bags when he struggled with security guards, who were attempting to retain control of the property as well as to detain him. He was released because he threatened to use force by stating he had a knife. A reasonable jury could conclude that this threat of force continued to exist when, just after he had been released, Froebe promptly turned back into the store and grabbed one of the bags of merchandise before fleeing.[1] Without his threats and use of force, he would not have been released and could not have succeded in completing the theft. A reasonable jury therefore could conclude that Froebe's use of

[1]In his reply brief, Froebe suggests the requirement in § 13-1902(A), that force or the threat of force be used "in the course of taking" property from another, implies that, "for a simple robbery, the force and the taking must be contemporaneous." Our supreme court rejected this argument in *Comer*. 165 Ariz. at 420-21, 799 P.2d at 340-41.

force and threat of use of a weapon was "in the course of taking . . . property of another" and was intended to prevent resistance to his doing so. § 13-1902(A).

¶12 Further, Froebe's jury, unlike the one in *Celaya*, received jury instructions and verdict forms permitting them to reach a guilty verdict on theft as a lesser-included offense of robbery. *See Celaya*, 135 Ariz. at 252-53, 660 P.2d at 853-54. But the jury found Froebe had committed robbery, and substantial evidence supported their verdict. *See Tison*, 129 Ariz. at 552, 633 P.2d at 361.

¶13 Accordingly, Froebe's convictions and sentences are affirmed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly